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Oklahoma Indian Gaming Association

August 15, 2012

Dear Chairman Stevens, Vice Chairman Cochran, and Commissioner Little,

As Chairman of the Oklahoma Indian Gaming Association ("OIGA") I offer the following comments on the Proposed Rules published in the Federal Register on June 1, 2012, amending 25 C.F.R. Part 547—Minimum Technical Standards for Gaming Equipment Used With the Play of Class II Games (the "Technical Standards") and 25 C.F.R Part 543—Minimum Internal Control Standards for Class II Gaming (the "MICS"). These comments have been approved by the OIGA Member Delegates.

I. The OIGA

The Oklahoma Indian Gaming Association is comprised of Native American Nations and Tribes that conduct governmental gaming on Indian lands in Oklahoma. Revenues from that gaming, which exceeded $3.5 billion in 2011, are extremely important to fund the self-government, self-determination, education, law-enforcement, infrastructure, housing and social support that advances tribal sovereignty and enhance the lives of our Member Tribes' citizens in vital and very personal ways.

II. The Importance of Class II Gaming

As the primary regulators of Class II gaming and the only entities with the authority to license or otherwise approve gaming systems prior to play,[1] our Member Tribes are very

[1] IGRA makes clear tribes are the primary regulators of Class II gaming. As Congress recognizes, Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming is not specifically prohibited by Federal law and is conducted within a state which does not, as a matter of criminal law and public policy, prohibit such gaming activity. 25 U.S.C. § 2701(5). Any Class II gaming on Indian lands continues to be within the jurisdiction of the Indian tribes, but shall be subject to IGRA. 25 U.S.C. § 2691(a)(2). IGRA limits the authority of the NIGC over Class II gaming to its Chairman, under the limited authority of § 2710, approving tribal ordinances regulating Class II gaming and approving Class II gaming management contacts, and to initiating enforcement actions under 25 U.S.C. § 2713. The NIGC itself only shall monitor Class II gaming, examine and inspect all premises on which Class II gaming is conducted, audit records representing gross revenues of Class II gaming and promulgate regulations (Con't)

interested in your proposed Class II Technical Standards and Minimum Internal Control Standards. Class II governmental gaming is particularly important to our Member Tribes. Tribal Revenues from Class II gaming are not diminished by sharing with the State. Strong Class II gaming is extremely valuable to tribes in Oklahoma and other states, that are approaching Class III compact negotiations. In states without Class III gaming, Class II is the only gaming available to help tribes foster self-determination. The standards you enact will have a direct economic impact on the lives of the citizens of our Member Tribes. We encourage you to view such impact as a predominant factor in your actions.

The OIGA expresses its gratitude to the NIGC for a superior regulatory review process. The appointment of a Tribal Advisory Committee with which the highest levels of the NIGC directly participated, the many consultations, the draft regulations, the welcoming of comments and the NIGC's serious review of them, and the ease of communication mark a new, and much needed chapter in the relationship between the NIGC and Indian Country. Although we do not expect that all interested parties will always agree on everything, the new found mutual respect is refreshing.

III. NIGC Tribal Advisory Committee

The OIGA has followed the progress of your regulatory review, and particularly the activity of your Tribal Advisory Committee (the "TAC"). In so doing we noted that you appointed 3 members (20% of the TAC) from Oklahoma which has over 50% of Class II gaming. We also observed that a majority of the TAC consisted of individuals from tribes without Class II Gaming, even though the TAC was to address only proposed regulations for Class II gaming. We further noted that your mediator convinced the TAC to operate by the highest requirement possible to reach results - consensus. Despite those high hurdles, and based on the attendance of our staff at every TAC meeting, we can say without reservation that the diverse expertise represented on the TAC, the consensus requirement, the detailed work done, and the TAC's demonstrated independence, confirm that the unanimous TAC recommendations represent the very best thinking of Indian Country, the Class II gaming industry's "best practices," and thus are highly persuasive.

IV. The Proposed Technical Standards

We particularly endorse the TAC recommendations on §547, the Technical Standards, and urge the NIGC to adopt those recommendations in their entirety. Although legitimate doubt exists as to the authority of the NIGC to enact Class II technical standards in light of the clear teaching in *Colorado River Indian Tribe v. NIGC*, 466 F.3d 134 (D.C. Cir. 2006)[2], we believe

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implementing that authority. 25 U.S.C. § 2706(b)(1)(8) and (10). Nothing in IGRA authorizes the NIGC to license games or impose requirements on Class II gaming, particularly prior to deployment.

[2] We remain very concerned that the intended and actual effect of the proposed Technical Standards is to control, in advance of play, how Class II gaming will actually be conducted. *Colorado River Indian Tribes v. NIGC*, 466 F.3d 134 (D.C. Cir. 2006) raises serious question as to the NIGC's authority to

that the TAC's recommendations on the Technical Standards reflects industry "best practices," and would be widely accepted among our Member Tribes. Therefore, adoption of the full TAC recommendations on Technical Standards would likely discourage any court challenges as to that authority.

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promulgate such Technical Standards. In justifying the current technical standards at the time of promulgation in 2008 against a commentator's claim of lack of NIGC authority, the prior NIGC premised its authority on the precatory language in 25 U.S.C. § 2702(2), a general statement of policy that gaming be "conducted fairly and honestly by both the operator and player" 73 Fed. Reg. No. 198, p. 60517 (Oct. 10, 2008), despite the fact that specific section had been previously found in *CRIT* to be an insufficient basis for the promulgation of regulations:

> The Commission is correct that Congress wanted to ensure the integrity of Indian gaming, but it is equally clear that Congress wanted to do this in a particular way. The declared policy is therefore not simply to shield Indian tribes "from organized crime and other corrupting influences" and to "assure that gaming is conducted fairly and honestly by the operator and players," 25 U.S.C. § 2702(2), but to accomplish this through the "statutory basis for the regulation of gaming" provided in the Act. *id.*

466 F.3d at 140.

Although there must be a specific statutory authorization of particular regulatory activity that the proposed rule implements, the NIGC in 2008 did not identify such regulatory activities that the Technical Standard implements beyond the NIGC authority to "monitor" Class II gaming, and "inspect" and "examine" places where such gaming occurs, as provided in 25 U.S.C. § 2706(b). The NIGC in 2008, justified the technical standards as "implementing its monitoring, inspecting and examining authority over Class II gaming specifically granted by IGRA in 25 U.S.C. § 2706(b), in other words, "watching". See 73 Fed. Reg. 60517. However, those express observational acts of watching are far more limited than mandating, in advance and under penalty of fine and closure, how gaming is to be conducted - the exact effect of the technical standards.

Finally, as noted by the Court of Appeals in *CRIT*, and contrary to the prior NIGC's assertion, at 73 Fed. Reg. 60517, the statutory authority to promulgate regulations to implement IGRAs does not alone empower the NIGC to exercise authority beyond those regulatory acts authorized by the IGRA:

> An agency's general rulemaking authority does not mean that the specific rule the agency promulgates is a valid exercise or final authority.

466 F.3d at 139.

The authority to engage in the observational acts of monitoring, examining and inspecting is completely consistent with the enforcement scheme set out at 25 U.S.C. § 2713(a) & (b). The NIGC has authority to fine any tribal gaming operator or management contractor engaged in violation of IGRA, an NIGC regulation or an NIGC approved tribal regulation, ordinance or resolution. Observing the conduct of Class II gaming to determine if IGRA, a valid NIGC regulation, or such a tribal enactment has been violated is clearly in aid of such enforcement authority. However, such observational authority, of itself, cannot be the basis for commands by NIGC regulation on how Tribes are to and not to conduct Class II gaming.

With regard to the proposed Technical Standards published in the Federal Register on June 1, 2012, we offer these specific comments on four provisions of great importance to our Member Tribes:

A. Tribally Owned Testing Labs

We applaud your revision in §547.5(f) allowing a tribally-owned testing lab to provide testing and certification required by the standards so long as the lab is independent of the manufacturer and operator from which it is providing testing. This recognition of tribal sovereignty is much appreciated.

B. Certification From Underwriters Laboratory

We appreciate your removal from §547.7 of the references to required certifications from Underwriters Laboratory and substituting a testing lab's report certifying that the operation of each interface will not be affected by electrostatic discharge, liquid spills, electromagnetic interference and radio frequency interference. By so doing, you alleviate an inappropriate lab monopoly, abolish unnecessarily overly broad regulation and recognize industry wide regulatory standards.

C. Entertaining Display

We strongly support your removal from §547.8(a)(2)(ii) and §547.8[d](2) of the entertaining display retention requirement. The inclusion of that phrase in the existing regulations reflected a serious misapprehension of law by the prior Commissioners. As you have rightly acknowledged multiple times in consultations and during the TAC meetings, the entertaining display does not dictate or per se reflect the results of bingo. Requiring recall of the last entertaining display screen gives the false impression that such display has legal consequence when it clearly does not.

D. The Grandfathered Games

(1) The Arbitrary and Capricious Nature of the 5-Year Limitation.

The OIGA is particularly troubled by the failure of the NIGC to remove from the proposed regulation the five year limitation on the play of grandfathered gaming systems. The limitation's arbitrary and capricious nature renders it unlawful, and, in our view, unable to withstand judicial review.

The arbitrary and capricious nature of the limitation was first demonstrated by the comments of the prior NIGC that attempted to justify the 5-year limitation when it was promulgated. Those technical standards allowed the continued play, for five years, of a gaming system that was found compliant with some, but less than all, of the technical standards. To be made "available to the public for play," 73 Fed. Reg. 60510 the gaming system merely need to be compliant with, in the NIGC's words, "a specific, minimum set of requirements," 73 Fed. Reg. 60511 (Oct. 10, 2008) By authorizing grandfathering, the NIGC has determined that grandfathered games possess the

integrity, security and auditability for both the public to play and the NIGC to accurately determine its fee assessments. If not, how could the NIGC have allowed the public access to such games for five years and how could the NIGC accurately assess fees to tribes based on such gaming?

The NIGC's own experience confirms that such gaming systems that are compliant with the grandfathering requirements possess ample protection of the public and of NIGC fee generation. Nothing has been provided by the NIGC in its response to comments to draft regulations, at its many consultations and the numerous tribal advisory committee meetings or through any enforcement action that suggest that a gaming system with sufficient compliance to achieve grandfather status, nevertheless *per se* fails to meet the claimed regulatory purposes of the technical standards-integrity, security and auditability.

Likewise, there is no factual basis to believe that the mere passage of time from four years, three hundred-sixty-four days, twenty three hours and fifty-nine minutes to five years somehow impairs that previously existing integrity, security and auditability of an otherwise lawful, compliant grandfathered system. Absent some such showing, the five year limitation has no factual basis to overcome its otherwise inherently arbitrary and capricious nature.

Additionally, the express justification for the five year limitation claimed by the prior NIGC in its promulgation of the regulation is factually inaccurate, at best. The NIGC limited the play of grandfathered systems to five years because play beyond that time would "create a permanent class of non-compliant equipment". 73 Fed. Reg. 60521 (Oct. 10, 2008). The perceived evil in such a class is that its inherent non-compliance would fail "to ensure the integrity and security of Class II gaming systems and the accountability of Class II gaming revenues." *Id.* In other words, play cannot extend beyond 5 years because grandfathered systems' limited compliance with technical standards *per se* puts operators, players and the NIGC at risk. Application of that premise, which is not dependent on the passage of time, should have prevented authorization of any play of grandfathered gaming systems at any time since they all possess the same characteristic of the permanent class of equipment the NIGC supposedly found so dangerous - non-compliance with all of the technical standards. However, that NIGC knowingly authorized the five year play of grandfathered systems based implicitly on the only real fact that could have justified such play - compliance with the grandfather requirements in fact prevents that very danger which the NIGC manufactured to justify the five year limit.

The NIGC cannot have it both ways. Either a gaming system that meets the requirements for grandfathering by definition has the security, integrity and auditability necessary to be played by the public and relied on by the NIGC for fee assessment, or it does not. If the grandfathered gaming system has those positive characteristics, and it must since the NIGC authorized the public play of such games and has not stopped that public play, denying the continuation of such play solely because of the passage of five years has no legal basis in fact and accordingly is arbitrary and capricious.

(2) The Lack of Market-Driven Obsolescence as the 5-Year Limitation Approaches.

The other purported reason for the five year limit, implied market obsolescence, cannot withstand even a cursory analysis. The prior NIGC apparently believed that projected change in the market would render all grandfathered games obsolete within the five year limit allowed for their play.[3] Accordingly, such a projected obsolescence was the factual hallmark of illegality. Under such thinking that obsolescence will render the grandfathered games illegal at five years.[4]

Disregarding the legal problem inherent in having illegality turn on obsolescence rather than gaming system characteristics, the extent of the usage of currently grandfathered Class II games in Oklahoma confirm that the projected market-driven obsolescence has not occurred. Over 4 years after the promulgation of the sunset provision **21** of the gaming tribes in Oklahoma (which number does not include two of the tribes with the most interfaces) currently use **16,193** legal Class II grandfathered player interfaces. Another **2,700** tribally-owned interfaces remain in storage. Those active player interfaces range from **130** to **4,717** per tribe. Those units occupy from **10%** to **100%** of tribal facility floor space, with two smaller operations reporting **100%** and several other tribes exceeding **30%**. When the figures are extrapolated to reflect the other **12** Oklahoma tribes using grandfathered Class II games, the number of units at issue could easily exceed **30,000**. The estimated value of the grandfathered player interfaces owned by tribes exceeds **$46 million.**

The figures clearly demonstrate that the only factual basis for declaring grandfathered games illegal after five years, market-based obsolescence, is false. The ongoing deployment of grandfathered games is irrefutable evidence that those games currently recognized by the NIGC as lawful, safe, reliable, honest and auditable remain not only economically viable, but also still desirable to tribal operators and public patrons alike. The anticipated market forces removing those games has not occurred, but rather have actually insured a stable revenue stream for the tribes deploying them.

(3) The Attack on Sovereignty.

Substantial policy reasons require repeal of the sunset provision. One of the IGRA's paramount purposes is to empower tribes to advance their sovereignty by operating gaming to generate revenue for governmental purposes. By outlawing games and player interfaces expressly recognized by the NIGC as currently lawful, the sunset provision impedes that tribal sovereignty in a very concrete way. **Twenty** Oklahoma gaming tribes estimate that they will lose in excess of **$82 million** from lost revenue due to downtime required for replacement of

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[3] In referencing projected obsolescence, the prior NIGC stated:

> What is more, the Commission believes that market forces will move equipment toward greater compliance

73 Fed. Reg. p. 6052 (Oct. 10, 2008)

[4] Of course if obsolescence is truly the hallmark of illegality, then there should be no time limits for grandfathered games. They will be legal until obsolete, whenever that occurs. That obsolescence will cause their removal from play. Upon such removal, the NIGC should have no concern as to the gaming system's newly developed illegality since they are no longer a threat to operator, player, or fee collector.

lease systems' and the loss of **6,998** tribally-owned grandfathered interfaces. There is no assurance that any replacement games will be accepted by players and be as profitable as the currently profitable grandfathered games. The overall impact can easily approach **$100 million.** Operators of small facilities will be required to replace their entire floor spaces with no assurance that their facilities will remain viable.

In addition to the real economic impact of the 5-year limitations, tribal sovereignty is offended by the NIGC's proposed decision to prohibit tribes from choosing to play otherwise legal games to which both operators and players have become accustomed. In essence, the NIGC has preempted tribal decision-making as to what game is best suited for a particular location for specific economic circumstances and, in so doing, deprived tribes of the right to determine for themselves whether currently lawful games are best for a particular location. IGRA does not authorize such an invasion of tribal sovereignty, rather it specifically declares that "The purpose of this Act is … to provide a statutory basis for the *operation of gaming by Indian tribes*," 25 U.S.C.2702(1) (emphasis added), not the NIGC.

V. Proposed Class II MICS

With regard to the proposed Class II MICS, published in the Federal Register on June 1, 2012, the OIGA commends to the NIGC the report of the TAC on Class II MICS. We particularly think that the use of general standards and safe harbor guidelines has much merit and warrants serious consideration. Such an approach equips the NIGC and Tribal Gaming Regulations with the ability to respond rapidly to unanticipated technological advances along with offering tribes the ability to draft regulations that recognize unique tribal circumstances both operational and economic. While we understand that the NIGC is not inclined to adopt the TAC recommended general standards/guideline approach at this point, we encourage the NIGC to consider that approach in the future and contact various financial and professional regulators who utilize such general standards approach for input.

As with the technical standards, the OIGA has particular concern about the lack of statutory authority to issue particular MICS. While the NIGC clearly has authority to issue regulations in connection with its authority to audit all records respecting gross revenues of Class II gaming, merely labeling a proposed regulation as a MICS does not establish statutory authority for the regulation. Accordingly, we believe the NIGC lacks authority to implement regulations concerning player tracking, gaming promotions, complimentary items, patron deposit accounts and lines of credit. Gaming promotions, by definition do not involve the generation of revenues, since no revenues are collected from a player. Likewise, player tracking systems as defined by §543.13 do not generate gross revenues of Class II gaming and cannot provide records of such gross revenues of gaming for the NIGC to audit pursuant to 25 U.S.C. § 2706. The requirement of §543.13 accordingly are beyond the NIGC's regulatory authority, as is §543.14's attempt to regulate patron deposit accounts and cashless systems. The regulations having nothing to do with the audit of records as to gross revenues from gaming. Likewise, §543.15's attempt to regulate the issuance of lines of credit is divorced from the actual waging of money. The sole inquiry for the NIGC audit of records of gross revenues for gaming is the amount wagered, not how or when the player obtained the wagered funds. We encourage the

NIGC to reconsider these proposed regulations in light of *CRIT* so that the possibility of a reprise of that litigation may be avoided.

VI. Expeditious Promulgation

Notwithstanding our desire to see the NIGC and the Class II gaming industry move to a more modern system of regulation, such as the TAC recommendation of a general standards and safe harbor approach, we find the proposed rules on Class II MICS to overall contain many significant improvements over the current flawed rules. Therefore, we strongly encourage the NIGC to move forward with final rules in an expeditious manner.

Similarly, we believe the proposed rules on Technical Standards are a significant improvement over the current legally flawed rules. With the simple, but legally and economically substantial, elimination of the five year sunset provision in the Grandfather clause, we can strongly support your proposed rule, and encourage expedient promulgation of a final rule.

Sincerely,

David J. Qualls SM

David J. Qualls,
Chairman